No. 82-1964

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1982

BENNY CONIGLIO,

Petitioner,

against

WARDEN, Clinton Correctional Facility,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Question Presented

Whether a writ should issue to review a decision of the United States Court of Appeals for the Second Circuit, which affirmed an order of the District Court for the Southern District of New York, that properly applied the standard promulgated by this Court for reviewing a state court conviction upon a writ of habeas corpus challenging the legal sufficiency of the evidence.

TABLE OF CONTENTS

	PAGE
Question Presented	1
Table of Authorities	IV
Statement of the Case	2
The Indictment	2
The Trial	2
The People's Case	2
The Defense	3
The Verdict and Sentence	3
The State Court Appeal	4
The Petition for a Writ of Habeas Corpus in Federal Court	4
Argument—A writ should not issue to review a decision of the United States Court of Appeals for the Second Circuit, which affirmed an order of the District Court for the Southern District of New York that properly applied this Court's rule for reviewing the legal sufficiency of the evidence supporting a state conviction, upon challenge by a writ of habeas corpus	5
Conclusion	10

TABLE OF AUTHORITIES

PAGE

Cases:

Jackson v. Virginia, 443 U.S. 307 (1979) 4–5, 9

People v. Coniglio, 74 A.D.2d 1004, 50 N.Y.2d 1000, 101 S.Ct. 358 (1980) 4

United States v. Johnston, 268 U.S. 220 (1925) 6

Statutes:

New York Criminal Procedure Law § 460.20 4

New York Penal Law § 125.25 ..... 2, 3

Other Authorities:

Stern and Gressman, *Supreme Court Practice*, 5th Ed. 6

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the Second Circuit Court of Appeals' decision in this case.

Statement of the Case

The Indictment

On June 28, 1973, the Grand Jury of Bronx County charged that petitioner, while acting in concert with another, committed the crimes of Murder in the Second Degree (New York Penal Law § 125.25), and Criminal Possession of a Weapon in the Third Degree (New York Penal Law § 265.02). Bronx County Indictment No. 124 of 1977.

The Trial

The People's Case

Tommy Genco was shot early in the morning of May 28, 1973, as he stood in front of a discotheque known as the "Cabaret Lounge." He was employed as a doorman there. Several eyewitnesses identified petitioner Benny Coniglio and George Clementi as being in the lounge that evening at the far end of the bar.

According to these witnesses, Coniglio, Clementi, an unknown third person and Tommy Genco entered into a heated discussion at the bar's end. Clementi hit Genco. The bartender then at work, a former New York City Police Officer named Jack Skulsky, noticed that both Coniglio and Clementi were wearing what appeared to be guns.

Later that night, John Genco, brother of the deceased, entered the Cabaret Lounge and observed two men at the end of the bar, the precise location where the other witnesses placed Clementi and Coniglio, staring at his brother. These two men then left the bar together.* When John

* Eyewitnesses testified that Clementi and Coniglio had left together.

Genco later stepped outside the bar with his brother, he saw these two men outside, talking to a woman.* When John Genco went to his car, which was parked a block away, he saw the same two men back up to him in a black car and then speed down the block towards the Cabaret Lounge. Tommy Genco was then seen leaning into a black car from which a shot was fired. He was hit in the head and died as a result.

Further testimony revealed Coniglio's flight from justice and established that the F.B.I. conducted an extensive investigation and search for Coniglio that continued for more than three years after the murder. It was revealed at trial that petitioner assumed a new identity and, with the help of his family, intentionally eluded the authorities.

Finally, Coniglio's girlfriend testified that petitioner had told her, some months after the murder, that he had shot someone in the head in front of a bar in New York. Coniglio told his lover that at the time of the shooting, he was seated in a car.

The Defense

Coniglio and Clementi did not testify in their own behalf, and called no witnesse at trial.

The Verdict and Sentence

Coniglio and Clementi were convicted after their trial by jury, of Murder in the Second Degree (New York Penal Law § 125.25), and sentenced on April 25, 1979, to indeterminate terms of imprisonment of twenty-five years to life.

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* The woman, Theresa Cicale, testified that Coniglio was with a man named "George" that night and that she did speak to Coniglio outside the bar.

The State Court Appeal

Petitioner appealed his conviction to the Appellate Division of the New York State Supreme Court, First Department, claiming *inter alia*, that the evidence produced by the People was insufficient to convict, as a matter of law.

The Appellate Division, First Department, unanimously affirmed petitioner's conviction, without opinion. *People* v. *Coniglio*, 74 A.D.2d 1004 (1st Dept. 1980). Petitioner then sought permission to appeal to the New York Court of Appeals pursuant to New York Criminal Procedure Law section 460.20. The Honorable Bernard S. Meyer, Associate Judge of the Court of Appeals, denied petitioner's application for leave to appeal to that court. *People* v. *Coniglio*, 50 N.Y.2d 1000 (1980). A subsequent petition for a writ of certiorari was denied by this Court on November 3, 1980. *Coniglio* v. *New York*, —— U.S. ——, 101 S.Ct. 358 (1980).

The Petition for a Writ of Habeas Corpus in Federal Court

Following the affirmance of his conviction, Benny Coniglio submitted an application for a writ of habeas corpus to the United States District Court for the Southern District of New York (Knapp, J.). In his petition, Coniglio raised the same claim he now asserts in the United States Supreme Court, namely, that the proof of guilt at his trial was insufficient to sustain his conviction. The petition was denied on October 20, 1982.

In his memorandum opinion denying Coniglio's petition, Judge Knapp stated, with respect to petitioner's claim that the proof at trial was insufficient under *Jackson* v. *Virginia*,

443 U.S. 307 (1979), that "*Jackson* is an extremely narrow holding which prevents a conviction from standing in the total absence of supporting evidence . . . In the instant case there was supporting evidence before the jury . . ." (Memorandum Opinion, p. 2).

On appeal to the court of Appeals for the Second Circuit, petitioner again claimed that his guilt was not sufficiently established under *Jackson* v. *Virginia, supra.* On March 4, 1983, that Court affirmed Judge Knapp's decision, stating that the evidence adduced at trial "was adequate to permit a rational trier of fact to find Coniglio guilty of the murder of T. Genco" (Memorandum Opinion, p. 2).

ARGUMENT

A writ should not issue to review a decision of the United States Court of Appeals for the Second Circuit, which affirmed an order of the District Court for the Southern District of New York that properly applied this Court's rule for reviewing the legal sufficiency of the evidence supporting a state conviction, upon challenge by a writ of habeas corpus.

Petitioner contends that a writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Second Circuit which held, using this Court's standard as enunciated in *Jackson* v. *Virginia,* 443 U.S. 307 (1979), that a rational juror could have found petitioner guilty beyond a reasonable doubt. Since the Second Circuit's decision, as well as that of the United States District Court for the Southern District of New York, applied the proper test, petitioner, in effect, is asking

this Court to review the evidence of his case and make its own factual determinations. However, a writ should not issue for this purpose and petitioner's application should be denied.

It is well-accepted that this Court will "not grant Certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Furthermore, this Court will not grant certiorari review where its own legal standards have been correctly applied, where no conflicts exist between either the courts of appeals themselves and/or the courts of appeals and this Court, and where no important constitutional issue has been raised. *See Stern and Gressman, Supreme Court Practice,* 5th Ed. 1978, §§ 4.4, 4.5, 4.12.

In his petition for a writ of certiorari, petitioner merely requests this Court to review the facts of his case, which have already been reviewed by a state appellate court and two federal courts. Indeed, he bases his instant factual claims on the same arguments which have already been rejected by the previous reviewing courts. Petitioner does not claim that this Court's *Jackson* standard has been misapplied, but merely contends that the evidence against him was insufficient for conviction and that in his opinion, when compared to decisions in other courts of appeals, his judgment cannot stand. Thus, petitioner has not raised sufficient issues to warrant review by this Court.

In any event, petitioner's conviction was supported by convincing evidence. Testimony by four eyewitnesses placing Coniglio at the far end of the bar conclusively es-

tablishes his presence in the Cabaret on the night of the murder. Motive and intent to murder Tommy Genco were displayed by petitioner when he and George Clementi had a heated conversation with the deceased shortly before his violent end. Two witnesses saw the dispute. Clementi was seen smacking the deceased, and petitioner was heard warning him that the fight was not over. Finally, a former New York City police officer testified that the two men had bulges in their waistbands, which he believed to be guns. Thus, the jury could easily conclude that the murderers were armed and disposed to violence against Tommy Genco.

Whereas petitioner's presence, motive and ability to act were established by direct proof, the actual murder was established circumstantially.

Only one inference need be drawn in order to establish petitioner's guilt beyond a reasonable doubt. If the jury could infer that the two men seen by John Genco when he entered the bar after the fight between petitioner and Genco's brother, who were seated near the disco-sound booth at the far end of the bar, were petitioner and his cohort, then the People could conclusively establish that they murdered Tommy Genco. This inference is easily drawn.

When John Genco walked towards his car after leaving the Cabaret Lounge, he noticed the two men who were earlier seated at the far end of the bar, standing near a brand new black car which was double-parked directly in front of the lounge. Theresa Cicale spoke with them. Moments later, as John Genco started up his car, the same late-model black car backed up from the Cabaret to the intersection in which Genco's car idled. From that car, two men stared at John Genco. With adequate opportunity to ob-

serve, Genco realized that these were the same two men who sat at the far end of the bar and later stood outside near the double-parked car with Theresa Cicale. Since Ms. Cicale testified that she was speaking with petitioner in front of the bar, it is clear that John Genco saw Coniglio in the black car.

Suddenly, the car sped away towards the Cabaret. As Nick DiGiorno, a patron in the bar, watched, shots were fired from inside a dark-colored car, shots that left Tommy Genco dead. Michael Vivenzio, a manager for the Cabaret Lounge, saw the black car speeding away with two men seated in the front seat.

Apparently acknowledging the overwhelming proof of his presence on the night in question, petitioner advances two arguments as supposed weaknesses in the People's proof. First, petitioner contends (petition, p. 13) that Ms. Cicale's testimony regarding his amorous advances negates his homicidal intent. As a matter of pure logistics, however, there is no reason why petitioner could not carry out his romantic intentions after killing Tommy Genco. Additionally, however, given petitioner's eagerness to boast to his girlfriend, Nanette Sanzo, about the murder some months later, there is no reason to suppose that he would be hesitant to allow Theresa Cicale to see him "be a man." Petitioner simply raises an inference, favorable to himself, which the jury refused to draw and which the lower federal courts properly rejected under the rules promulgated by this Court in *Jackson* v. *Virginia, supra.*

Additionally, petitioner argues (petition, p. 17) that there was insufficient proof that the black car seen by John

Genco backing towards his car, stopping in front of him, and then speeding off toward the Cabaret Lounge, was the same car from which the shots were fired. Petitioner misstates the issue. The only question for federal habeas corpus purposes is whether it was *reasonable* for the jury to infer that the black car which John Genco saw was the same black car which Nick DiGiorno saw Tommy Genco lean into. *Jackson* v. *Virginia*, 443 U.S. 307 (1979). This inference is eminently reasonable since the car which DiGiorno saw contained two men and sped off after the shots were fired, just as the car seen by John Genco had raced to the Cabaret Lounge from the corner before the killing. Added to these hard facts is the additional evidence indicating that just less than two months before the murder, George Clementi purchased a brand new black Buick, which he registered in his name. Shortly before the murder, Theresa Cicale had driven in the car with Benny Coniglio. Clementi's ownership of a brand new black car and Coniglio's independent use thereof are consistent with the use of that vehicle in the execution of Tommy Genco. Thus, petitioner's contention that no rational trier of fact could conclude that the cars were one and the same is untenable.

When the additional evidence of Coniglio's admission to his girlfriend is considered, it is impossible to imagine any rational juror finding the proof lacking. Shortly after the murder, petitioner told Nanette Sanzo that, while in a car in front of a bar in New York, he shot someone in the head. Thus, petitioner made an admission in sufficient detail to show that it stemmed from personal knowledge of the homicide, providing highly probative evidence of his guilt.

Finally, the pattern of lies and deceptions perpetrated by Coniglio and his family could only be interpreted as an attempt on his part to avoid capture and punishment for his unlawful deed. Coniglio disappeared immediately and was located only after a thorough investigation which spanned nearly four years. This evidence, coupled with the direct and circumstantial proof of guilt, properly convinced the jury of petitioner's guilt, beyond a reasonable doubt.

In sum, petitioner's arguments fail to create jurisdiction for certiorari review and, while important to petitioner, present no issue of legal consequence. Review of this case would not benefit the administration of justice. Therefore, this case is not an appropirate one for the issuance of a writ of certiorari, especially where this Court has denied petitioner such a writ, sought on the same legal grounds, following the affirmance of his conviction in the state courts.

Conclusion

The petition for a writ of certiorari should, in all respects, be denied.

Respectfully submitted,

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